INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	3
STATEMENT	4
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	10, 11
APPENDIX A—Opinion of Court of Appeals, Tenth Circuit	12
B—Judgment in U.S. District Court	19
C—Petition for Rehearing and Order Denying Same	21
D—Statutes Involved	21

CITATIONS

CASES:

American Home Fire Assur. Co. v. Mid-West Enterprise Co., 10 Cir., 189 F. 2d 528	13
Beard v. Achenbach Memorial Hospital Assoc., 10 Cir., 170 F. 2d 859	14
Carnes v. United States, 10 Cir., 186 F. 2d 648	14
Carter Oil Co. v. McCasland, 10 Cir., 190 F. 2d 887, cert. den. 342 U.S. 870	13
City and County of San Francisco v. Transbay Construction Co., 134 F. 2d 468	9
Continental Casualty Co. v. U.S. for Use of Schaefer, 9 Cir., 173 F. 2d 5, cert. den. 337 U.S. 940	17
Drainage Dist. No. 1 v. Rude, 8 Cir., 21 F. 2d 257	17
Equitable Surety Co. v. United States, 234 U.S. 448	10
Fell v. U.R. Ry. Co., 32 Utah 101, 88 Pac. 1003	19
Foulger v. McGrath, 34 Utah 86, 95 Pac. 1004	10
Frailey v. McGarry, 116 Utah 504, 211 P. 2d 840	15
Keokuk Steel Casting Co. v. Lawrence, 10 Cir., 178 F. 2d 788, cert. den. 339 U.S. 931	14

Page

Lichter et al., v. Goss, et al., 232 F. 2d 715 ..... 9, 15

Montrose Contracting Co. v. County of Westchester, 2 Cir., 80 F. 2d 841, 843 17

Ryan v. Curlew Irr. & Res. Co., 36 Utah 382, 104 P. 218 17

Salt Lake City v. Smith, 104 Fed. 457 ..... 8, 16

Sammons-Robertson Co. v. Massman Construction Co., 156 F. 2d 53 9

Schwasnick v. Blandin, 2 Cir., 65 F. 2d 354 18

Southern Painting Co. of Tenn. v. United States, 222 F. 2d 431 17

St. Paul-Mercury Indemnity Co. v. United States for Use of Jones, 10 Cir., 238 F. 2d 917 17

United States v. Behan, 110 U.S. 338 18

United States v. Binghamton Const. Co., 347 U.S. 171 8

United States v. Blair, 321 U.S. 730 8

United States v. Callahan-Walker Const. Co., 317 U.S. 56 8

United States v. Moorman, 338 U.S. 457 8

United States v. Rice, 317 U.S. 61 8

United States for Use of Susi Contracting Co. v. Zara Contracting Co., 2 Cir., 146 F. 2d 606 18

Van Dreal v. Van Dreal, 10 Cir., 214 F. 2d 715 14

Wheatley v. Oregon Short Line R. Co., 49 Utah 105, 162 Pac. 86 19

Widney v. United States, 10 Cir., 178 F. 2d 880 14

Wilson v. Salt Lake City, 8 Cir., 52 Utah 506, 174 Pac. 847 ..... 16, 17, 19

STATUTES:

28 U.S.C. Section 1254 (1) 2

49 Stat. 793, Sections 1 and 2; 40 U.S.C. Sections 270a and 270b (Miller Act) 3, 21

62 Stat. 21, Section 2(c) 3 and 4; 41 U.S.C. Section 151(c) (Armed Services Procurement Act) 3, 4, 24

62 Stat. 22; 41 U.S.C., §152, Section 3 27

Page

62 Stat. 23, is amended by 65 Stat. 700; 41 U.S.C., §153, Section 4. 24

70a Stat. 641 (Armed Services Procurement Act) Footnote 7

MISCELLANEOUS:

5 Williston on Contracts—Perm. Ed. §1485 Page 4146 §1459 Page 4077 18

Restatement, Contracts, §34 of Comment c 18

58 Am. Jur. Work & Labor §10 18

Federal Rules of Civil Procedure—Rule 52 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. .....

WUNDERLICH CONTRACTING COMPANY, a corporation; CURLETT CONSTRUCTION COMPANY, a corporation; and CHAS. H. TOMPKINS CO., a corporation, doing business as a joint venture under the name of WUNDERLICH, CURLETT & TOMPKINS; NATIONAL SURETY CORPORATION, a corporation; CONTINENTAL CASUALTY COMPANY, a corporation; THE TRAVELERS INDEMNITY COMPANY, a corporation,

Petitioners,

vs.

UNITED STATES OF AMERICA ex rel. REISCHEL & COTTRELL, a California corporation; and MARTIN BROS., a copartnership consisting of W. L. MARTIN and JOHN MARTIN, doing business as a joint venture under the name of REISCHEL & COTTRELL-MARTIN BROS.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Wunderlich Contracting Company, Curlett Construction Company, Chas. H. Tompkins Co., Continental Casualty Company, National Surety Corporation, and The Travelers Indemnity Company, pray that a

writ of certiorari be issued out of and under the seal of this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit, rendered on January 2, 1957, affirming a judgment of the United States District Court for the District of Utah.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 240 F. 2d 201. It appears in the type transcript of record of the Court of Appeals at pages 3-14 and is printed in Appendix A hereto. The District Court did not render an opinion. The judgment of the District Court (R. 17)[1] is printed in Appendix B hereto. The Findings of Fact and Conclusions of Law of the District Court appear at R. 14-17.

JURISDICTION

The judgment of the Court of Appeals was entered on January 2, 1957 (Cir. R. 3-14; Appendix A. infra). Rehearing was denied on March 5, 1957 (Cir. R. 25; Appendix C, infra). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

Where the United States Government has entered into a construction contract with a prime contractor, which contract contains the usual provisions for changes, extras, changed conditions and settlement of disputes, and the prime contractor has in turn entered into a subcontract

[1]Inasmuch as the Transcript of Proceedings before the Court of Appeals is not numbered consecutively with the District Court Record, the former will be referred to as "Cir. R.", the latter as "R."

under which the subcontractor has agreed to be bound by the terms and conditions of the prime contract and "assume all the obligations and responsibilities of the [prime contractor] required by the prime contract" insofar as it applies to the work undertaken by the subcontractor:

1. Whether, after the contract is completely performed and the construction completed in accordance with plans and specifications furnished by the Government, and the subcontractor having participated in the changes and disputes procedures throughout performance, and having signed written acceptances of "change orders" on various occasions, and not having taken any steps toward recission of the subcontract may thereafter disregard the contractual provisions for adjustments in price and settlement of disputes and recover from the prime contractor in *quantum meruit* the reasonable value of material and labor incorporated into the Government building project.

2. Whether, when it has been determined that the number of changes ordered by the Government in the plans and specifications are such as to constitute an "abandonment" of the prime contract, the Court may nevertheless retain jurisdiction under the Miller Act (40 U.S.C. §§ 270a, 270b).

STATUTES INVOLVED

The statutory provisions involved are Sections 1 and 2 of the Miller Act, 49 Stat. 793, 40 U.S.C. §§ 270a, 270b and Sections 2 (c), 3 and 4 of the Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C. §§151 (c), 152, 153. The statutes are printed in Appendix D hereto.

STATEMENT

This action was brought by the United States of America for the use and benefit of Reischell & Cottrell - Martin Bros., a joint adventure. Jurisdiction of the United States District Court was claimed under the provisions of the Miller Act (R. 2, Par. II). The Complaint contained three causes of action, the first of which was based upon a subcontract between the relators and the joint adventure of Wunderlich, Curlett & Tompkins (R. 3, Par. XI), under which the relators were to perform certain work and furnish certain materials for a 500-bed Veterans Administration hospital in Salt Lake City, Utah (R. 2, Par. VI). The second cause of action was based upon breach of contract (R. 4, Par. III), and the third upon quantum meruit for the reasonable value of the services and materials (R. 6, Pars. II, III, IV). Since the first cause of action contained sufficient jurisdictional allegations the complaint was not subject to an attack on a jurisdictional ground. However, petitioners did, in their answer, contend that the action would not lie under the Miller Act insofar as the second and third causes of action were concerned (R. 10, Par. 1; R. 11, Par. 1). As to the first cause of action, it was petitioners' contention that a determination by the Government Contracting Officer of any amounts due was a condition precedent to the action. This contention was included as an issue in the District Court's Pretrial Order (R. 12, Par. 1).

In its Findings of Fact, the District Court found that it was impossible to erect the hospital in accordance with the plans and specifications and terms of the original con-

tract (R. 15, Par. VI) and concluded that the work and materials furnished by the relators were not furnished under the written contract but under an implied contract (R. 17, Par. III), and that relators were entitled to recover the reasonable value thereof (R. 17, Par. IV). The court determined reasonable value by taking the relators' total costs on the project and adding thereto five percent for overhead and ten percent for profit (R. 212, 303). Judgment was entered in favor of the respondent for $69,483.76, together with interest from August 13, 1952, and costs (R. 17; Appendix B, infra).

An appeal by petitioners was heard by the United States Court of Appeals for the Tenth Circuit, and on January 2, 1957, the Court of Appeals affirmed the judgment of the District Court (Cir. R. 3-14; Appendix A, infra). The Circuit Court of Appeals based its decision upon the fact that the Government, during the performance of the contract, had ordered 6,000 changes in the prime contract, and that the buildings as completed were "different" buildings than the ones projected on the original plans and specifications submitted to respondent (Cir. R. 5, 7; pp. 14-17, infra); that the prime contract was abandoned; that the petitioners in substance were guarantors of the sufficiency of the plans and specifications furnished by the Government and responsible to respondent for changes ordered by the Government. On Petition for Rehearing petitioners argued to the Court of Appeals that by placing its affirmance on the grounds of abandonment jurisdiction under the Miller Act was lost (Cir. R. 19-21). The Petition for Rehearing was denied on March 5, 1957, (Cir. R. 25).

REASONS FOR GRANTING THE WRIT

1. The judgment below involves important questions of federal law which have not been, but should be, settled by this Court. The questions will have a far-reaching effect upon the ability of the United States Government to enter into contracts for public works, services and supplies, and to obtain qualified contractors who will contract with the Government at reasonable prices and charges. The judgment will also affect the ability of Government contractors to obtain bonds of the type required by the Miller Act.

The willingness of contractors to enter into contracts with the Government depends, in many instances, upon whether the contractors can protect themselves from unforeseeable changes required by the Government during the progress of the work. Government orders interpreting and changing the plans and specifications usually as in this case affect the work performed by subcontractors. In the past it has been possible to gain protection through careful draftsmanship of contracts. The effect of the judgment of the Court below is to place it beyond the power of a contractor to protect himself by contract. He may think himself protected but, when the contract is completed, will find that it has been "abandoned"; that the Government during construction has made changes in the plans and specifications and interpreted said plans and specifications for which contractor becomes liable to his subcontractor on a cost plus (quantum meruit) basis. When the contract is abandoned, he finds that all of the provisions for determination of price adjustments for changes and extras, and settlement of disputes, are abandoned with it.

The prime contractor is placed in a position in which he must pay a subcontractor the reasonable value of a benefit conferred upon the Government. The prime contractor has to pay this notwithstanding he has received no benefit from the Government, and may not be able to do so. He finds himself faced with an insurmountable difficulty if he tries to establish "abandonment" by the Government of the prime contract. For instance, the Armed Services Procurement Act of 1947[2] under which the present contract was let, required that contracts be awarded after formal advertising, except in certain instances in which negotiation is permitted. To permit the prime contractor to recover from the Government for "reasonable value," particularly when that value is determined by adding to total costs, percentages for overhead and profit, would be to permit the Contracting Officer to subvert the formal advertising provisions of the Procurement Act. Moreover, it would violate those provisions of Section 4 of the Armed Services Procurement Act which prohibit contracting on a cost-plus-percentage-of-cost basis.

Surety companies, too, find themselves exposed to a type of liability which they might not, in future cases, be willing to assume. Bonds written under the Miller Act are executed with the understanding that they are to guarantee payments for work performed under the written contract that the bonds supplement. To hold them liable for payments under a new contract—after abandonment of the first— would greatly increase their risks.

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[2]This act has now been superseded by the Act of August 10, 1956; C. 1041, §53 (70A Stat. 641)—but the substance has been retained.

The problems of administration of Government contracts are important problems, not only for persons who deal with the Government but for the Government itself. This Court has frequently regarded Government contract questions of sufficient importance to grant writs of certiorari. See, for example, *United States v. Callahan-Walker Const. Co.*, 317 U.S. 56; *United States v. Rice*, 317 U.S. 61; *United States v. Blair*, 321 U.S. 730; *United States v. Moorman*, 338 U.S. 457; *United States v. Binghamton Const. Co.*, 347 U.S. 171.

2. The decision of the Court of Appeals for the Tenth Circuit is erroneous. The Court took the position that the instant case was governed by the rules set out in *Salt Lake City v. Smith*, 104 Fed. 457, decided by the Eighth Circuit Court of Appeals in 1900. We believe the case to be representative of a reluctance upon the part of courts to give effect to contractual provisions for adjustment of prices and settlement of disputes, and a case which should not be followed. Moreover, *Salt Lake City v. Smith*, is materially different on its facts from the present one: there the action was between a contractor and an owner and the owner presumably got its money's worth; here the action is between a subcontractor and a prime contractor, and the prime contractor may receive nothing for his money; there the changes were ordered by the defendant (party to action); here they were ordered by the United States Government a third party not before the court; there, injustice may have been avoided by not holding the contractor to the prices set out in the contract; here there is no evidence of such injustice, the Court having decided the amount due without waiting for the Department head to reach a final decision

on the amount of equitable adjustment in pursuance to the terms of the prime (Government) contract.

By virtue of the Court's decision, written contracts go for naught. Here the subcontractor's bid was prepared from the same Government plans and specifications used by the prime contractor. After the subcontract was completed the Court compared the performance with the prime contract and found that there was such a substantial difference that the prime contract was "abandoned." The only evidence of such abandonment was 6,000 changes ordered by the Government. There was no evidence as to how many of the changes related to the subcontract, nor of the character or quality of the changes that did relate to it. There was evidence however, that more than 3,500 changes were paint changes and had nothing to do with the plastering subcontract. Respondent subcontractor admitted that all changes were ordered by the Government. No act of rescission was present or considered necessary by Respondent. The case appears to be contrary to the philosophy implicit in such cases as *City and County of San Francisco v. Transbay Construction Co.*, 134 F. 2d 468; *Sammons-Robertson Co. v. Massman Construction Co.*, 156 F. 2d 53; and *Lichter et al., v. Goss, et al.*, 232 F. 2d 715. We think the cited cases are correct and that where a subcontractor elects to perform and the prime contract and his subcontract provides the method for seeking changes, extras and increased compensation—unless some duress is shown—he is bound by these contractual provisions.

The Court erred, also, in retaining jurisdiction over the case after concluding that the 6,000 changes in the prime

contract resulted in abandonment of the prime contract and the subcontract. Although we agree that there sometimes may be *quantum meruit* recovery under the Miller Act, the statute provides for Miller Act jurisdiction only in the case of actions brought upon bonds given in connection with particular formal Government contracts. Section 1 of the Miller Act requires contractors to furnish a bond before they may be awarded Government construction contracts exceeding $2,000.00 in amount. Section 2 of the Miller Act confers jurisdiction on United States District Courts over actions by persons who have furnished labor or material "in the prosecution of the work provided for in such contract." A question as to the effect upon the obligation of a surety where work is performed that is outside the scope of the original contract was raised but not answered in *Equitable Surety Co. v. United States*, 234 U.S. 448. We believe that where a contract is abandoned the surety is discharged, and jurisdiction to bring an action on the bond under the Miller Act is lost.

The Court of Appeals should have held that if there was an abandonment of the prime contract there was no jurisdiction, and recognized that if the prime contractor was bound by its contract with the Government the subcontractor was also bound by the same contract. The Court also erred in allowing profit as an element of recovery for *quantum meruit*. The allowance is contrary to the rule of the state in which the action arose. See *Foulger v. McGrath*, 34 Utah 86, 95 Pac. 1004.

CONCLUSION

The effect of the judgment of the Court of Appeals is to discourage competitive bidding; to require Government contractors to include in their bids a sum to cover unforseeable changes by the Government; to assume liability therefor, and to guarantee the plans and specifications furnished by others. Failure to carry out changes ordered by the Government may make the prime contractor liable for breach of contract; and acceptance of the changes may make the prime contractor liable for the reasonable value of services performed by subcontractors whose subcontracts have been abandoned. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Before BRATTON, Chief Judge, and HUXMAN and PICKETT, Circuit Judges.

PICKETT, Circuit Judge.

The defendants Wunderlich Contracting Company, a corporation, Curlett Construction Company, a corporation, and Charles H. Tompkins Company, a corporation, doing business as a joint venture under the name of Wunderlich, Curlett & Tompkins, entered into a contract with the United States to construct a five hundred bed Veterans Administration hospital at Salt Lake City, Utah, for the sum of $7,898,000. The plaintiffs, also a joint venture, doing business as Reischel & Cottrell-Martin Bros., were the successful bidders to do all the lathing and plastering work for the hospital for the sum of $244,650.00, and accordingly entered into a lump sum subcontract with the above named defendants to do this portion of the work, according to the plans and specifications submitted to bidders. The defendants National Surety Corporation, a corporation, Continental Casualty Company, a corporation, and The Travelers Indemnity Company, a corporation, furnished payment bonds as required by the Miller Act. (40 U.S.C.A., §270 b (a), et seq.) The plaintiffs brought this action to recover a balance claimed to be due for the labor and materials which they furnished on the construction of the hospital.[1] The trial court found that due to not less than 6,000 substantial

[1]The complaint is in three causes of action, each presenting a different theory for the recovery of the same amount. The first cause of action alleges that the sum of $82,657.66 is due for labor and materials furnished under the terms of the contract. The second cause of action appears to be for damages caused by a breach of contract. The third cause of action was the balance due for the reasonable value of plaintiffs' performance. The $82,657.66 figure in the complaint was reduced to $69,483.76.

changes required to be made in the plans and specifications during construction, the structure which was actually built was not the same as that originally proposed; that the unprecedented and unreasonable number of changes in the plans and specifications and dislocation of work greatly increased the cost to plaintiffs in completing the work and increased the time of performance by 50%; that the performance of the plaintiffs was not rendered under the subcontract, but that the hospital was built under an entirely different set of plans and specifications than those submitted to the plaintiffs by the defendants for bidding purposes, and in consideration of defendants' implied promise to pay therefor. The effect of the court's holding is that the subcontract was abandoned. The defendants concede that considerable work was done by plaintiffs for which they were entitled to compensation over and above the contract price. They contend, however, that all the work was done pursuant to the subcontract and that they are liable only as to the provisions of the contract. The court found that the reasonable value of plaintiffs' services was $340,379.58, of which $270,895.82 had been paid, leaving a balance due of $69,483.76. Judgment was entered for this amount, with interest from August 13, 1952.

The first issue to be determined is whether the aforementioned findings are sustained by the evidence. Rule 52 (a), F.R.C.P., provides that in all actions tried upon the facts, without a jury, the court's findings of fact shall not be set aside unless clearly erroneous. *Carter Oil Co. v. McCasland,* 10 Cir., 190 F. 2d 887, cert. den. 342 U.S. 870; *American Home Fire Assur. Co. v. Mid-West Enterprise Co.,* 10 Cir., 189 F. 2d 528. Where the evidence and reasonable inferences fairly to be drawn therefrom are sufficient

to support the findings of the trial court in a non-jury case, they will not be over-turned on appeal unless clearly erroneous. *Beard v. Achenbach Memorial Hospital Assoc.*, 10 Cir., 170 F. 2d 859. Also, if it is established by facts from which reasonable men might draw different inferences, appellate courts may not substitute their judgment for that of the trial court. *Van Dreal v. Van Dreal,* 10 Cir., 214 F. 2d 715; *Keokuk Steel Casting Co. v. Lawrence,* 10 Cir., 178 F. 2d 788, cert. den. 399 U.S. 931; *Widney v. United States,* 10 Cir., 178 F. 2d 880; *Carnes v. United States,* 10 Cir., 186 F. 2d 648.

A careful examination of the record discloses substantial evidence to support these findings. The evidence is without conflict that the original plans, drawings and specifications were completely overhauled and changed and that there were not less than 6,000 changes made in them. The completion date under the original plans was July 31, 1951, but plaintiffs, because of confusion in the plans and specifications and the changes made, were not able to complete their work until August 13, 1952, and then at a much higher cost. In addition to other evidence, defendant's Project Engineer, who the record discloses knew more about the building than anyone else, testified that in his opinion the building which plaintiffs lathed and plastered was not the same building as that contemplated by the original plans. Colonel Thomas, who had vast experience in government construction work, was employed by defendants as Assistant Project Manager for the construction of the hospital. He testified that in his experience he had never seen anything like the number of changes made in plans and specifications and, as far as the plastering was con-

cerned, they were operating pretty much under a new set of plans. The record discloses that throughout the contract the defendants made claim to the United States to be paid for specific work performed by the plaintiffs which was not contemplated when the subcontract was entered into. It is insisted that those claims were made pursuant to the provisions of the prime contract and the subcontract, and that many of them were pending at the time of trial.

The defendants contend that the contract as a whole contemplated that the hospital might not be built in exact accordance with the submitted plans, drawings and specifications, and made provision for variations which bound the contractor. The prime contract had the usual provisions for change-order work and for extras, and provided a method by which the United States would pay for this type of work. It is urged that the evidence discloses that plaintiffs did rely on the contract in carrying out the work, therefore cannot avoid its terms even though they might have had grounds for rescission. Stated differently, the defendants say that plaintiffs had a contract to do certain work on this project and if the changes were such that their required work was not that which they had agreed to do, they should have rescinded, and having elected to continue they are bound by the contract. The defendants rely on a line of decisions which hold that even though there were grounds for a rescission of the contract, a party electing to proceed without rescission is bound by the terms of the contract. Typical of these decisions are *Lichter v. Goss,* 7 Cir., 232 F. 2d 715, and *Frailey v. McGarry,* 116 Utah 504, 211 P. 2d 840. In most of these cases it is assumed that the work was performed under the subcontract.

In view of the court's finding, which is supported by substantial evidence, that the work performed by the plaintiffs was not that contemplated by the parties when they entered into the subcontract, the rule of the above cases is not applicable. Under these findings, we think the rule of *Salt Lake City v. Smith,* 8 Cir., 104 Fed. 457, controls. That case arose in Utah and grew out of a contract whereby the plaintiffs agreed to furnish labor and materials to construct a covered conduit in connection with the water system of Salt Lake City. As the work progressed, the City Engineer continuously required substantial changes in the plans, and the plaintiffs were required to construct a conduit which was entirely different from that contemplated by the original contract, and plaintiffs sued for the reasonable value of their services, which was substantially more than the amount provided for in the contract. The question was whether the work and materials fell within or without the plaintiffs' contract with the city. It was held that the labor and materials furnished were not contemplated by the parties when they made their agreement, therefore the contract did not control and the plaintiffs could recover the reasonable value of their services. It was held that defendants had the right to require the plaintiffs to perform the subcontract, but they had no right to require them to perform large quantities of work entirely different in character and cost from that originally contemplated by the parties when they made their contract. There was no meeting of the minds of the parties to do work other than that contemplated by the contract, and if such work was required and the defendants received the benefit of it, plaintiffs were entitled to recover the reasonable value. *Wilson*

v. Salt Lake City, 8 Cir., 52 Utah 506, 174 Pac. 847, and *Drainage Dist. No. 1 v. Rude,* 8 Cir., 21 F. 2d 257, are to the same effect.[2]

A contractor who bids for work has the right to rely on the plans and specifications submitted to him for bidding purposes. The rights of the parties are to be measured by them. It is only through the plans and specifications that he can make an intelligent bid. *Ryan v. Curlew, Irr. & Res. Co.,* 36 Utah 382, 104 P. 218. Burdens other than those contemplated by contract, may not be placed upon the contractor without additional compensation. *Continental Casualty Co. v. U.S. for Use of Schaefer,* 9 Cir., 173 F. 2d 5, cert. den. 337 U.S. 940.

We recently held that an action in quantum meruit is available in Miller Act cases. *Southern Painting Co. of Tenn. v. United States,* 222 F. 2d 431; *St. Paul-Mercury Indemnity Co. v. United States for Use of Jones* 10 Cir., 238 F. 2d 917. Assuming this right to exist, defendants urge that

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[2]In discussing the Salt Lake City case, it was said in Montrose Contracting Co. v. County of Westchester, 2 Cir., 80 F. 2d 841, 843: "As pointed out in the Salt Lake City case, in interpreting such clauses, the great desideratum is to ascertain the terms upon which the minds of the parties met and the sense in which they were used when the parties made the agreement. There a stipulation in the contract provided that the contractor or its engineers could make any necessary or desirable alteration in the work required and the contractor would be paid therefor at the contract rate. The effect of this broad clause was held to be limited by the subject-matter of the contract and the intention of the parties when it was made to such modifications of the work as were then contemplated. It did not cover a radical change in the nature or cost of the work or materials required. For all work and materials required by such uncontemplated changes in the plans, the contractor recovered the reasonable value, notwithstanding the agreement. And in sustaining a recovery for the contractor the court said, at page 464 of 104 F.: 'It is conceded that the literal terms of the contract, when divorced from reason, from the object contemplated by the parties, from their situation, and from their intention, are so general and unlimited as to permit this to be done. But it is clear as the sun at noon in a cloudless sky that the minds of these parties never met on such a proposition, and that they never contemplated or intended to make any such contract.' * * *".

the evidence is insufficient to sustain the amount found to be the reasonable value of the services and materials furnished. We do not agree with this contention. In cases like this, reasonable value of services and materials is generally considered to be the amount for which they could be obtained under like circumstances. *U.S. v. Behan,* 110 U.S. 338; *U.S. for Use of Susi Contracting Co. v. Zara Contracting Co.,* 2 Cir., 146 F. 2d 606; *Schwasnick v. Blandin,* 2 Cir., 65 F. 2d 354; 5 *Williston on Contracts,* Perm. Ed., §1485, p. 4146, §1459, p. 4077, Footnote 5; *Restatement, Contracts,* §347, Comment c; 58 *Am. Jur., Work and Labor,* §10.

There was introduced in evidence an accountant's report taken from plaintiffs' books which showed that the actual cost of the work, including overhead and profit, was $340,379.58. Of this amount there was $69,483.76 shown to be due. The items making up this balance were shown to be in addition to those for which payment had been made. There was testimony by one of the officers of the plaintiffs, and defendants' Project Engineer agreed, that the charges for these items, with few exceptions, were fair and reasonable. There is no evidence that plaintiffs had been overpaid at the time these latter services were rendered. Furthermore, defendants presented a claim to the United States for these services, usually in the identical amounts claimed by the plaintiffs. We do not hold that the filing and presentation of these claims estopped defendants to deny their reasonableness, but the trial court was justified in considering them in arriving at reasonable value. There is no evidence that the claims were unreasonable. The real dispute appears to be that of liability.

The appellants assign as error the rulings of the court on the admissibiity of evidence. We have examined these assignments and find them to be without merit. The case tried to the court without a jury, and we feel satisfied that the trial court fully understood, as we understand, the contentions of the parties and the controlling issues of the case.

Finally, it is contended that the court erroneously allowed interest from August 13, 1952, the date upon which plaintiffs' claim was found to be due and payable. In *Southern Painting Co. of Tenn.*, supra, we held that the right to interest in ordinary Federal Court cases is to be determined by State law. The rule in Utah is that the right to interest is not to be determined by whether the damages are liquidated or unliquidated, "but whether the injury and subsequent damages are complete." *Wilson v. Salt Lake City*, 52 Utah 506, 174 Pac. 847; *Wheatley v. Oregon Short Line R. Co.*, 49 Utah 105, 162 Pac. 86; *Fell v. U.R. Ry. Co.*, 32 Utah 101, 88 Pac. 1003. There was no error in the award of interest. The work was completed on August 13, 1952, and the balance became due on that date.

AFFIRMED.

APPENDIX B

JUDGMENT BELOW

This cause came on regularly for trial on the 16th day of November, 1955, Lewis C. Teegarden, Esquire, appearing as counsel for the plaintiffs; Allan E. Mecham, Esquire, Elliott Lee Pratt, Esquire, and Bryce E. Roe, Esquire, appearing as counsel for the defendants; and E. L. Schoenhals, Esquire, appearing as counsel for the third-

party defendant. A trial by jury having been expressly waived by the respective parties, the cause was tried before the Court, sitting without a jury. Whereupon, witnesses on the part of plaintiffs, defendants and third party defendant were duly sworn and examined and documentary evidence introduced by the respective parties, and the Court having continued the matter for argument on January 4, 1956, and the Court having heard the arguments of counsel and being fully advised, and having heretofore been entered in favor of third-party defendant, and against the defendants,

IT IS HEREBY ORDERED, ADJUDGED AND DECREE THAT:

Reischel & Cottrell, a California corporation, and Martin Bros., a copartnership consisting of W. L. Martin and John Martin, doing business as a joint venture under the name of Reischel & Cottrell-Martin Bros., plaintiffs, do have and recover of and from the defendants, Wunderlich Contracting Company, a corporation, Curlett Construction Company, a corporation, and Chas. H. Tompkins Co., a corporation, doing business as a joint venture under the name of Wunderlich, Curlett & Tompkins; National Surety Corporation, a corporation; Continental Casualty Company, a corporation, and The Travelers Indemnity Company, a corporation, the sum of $69,483.76, with interest thereon at the rate of 6% per annum from August 13, 1952 in the amount of $14,788.46, amounting in all to the total sum of $84,272.22, together with plaintiffs' costs incurred in this action.

Dated: Feb. 29, 1956.

WILLIS W. RITTER, *Judge*

APPENDIX C

PETITION FOR REHEARING ORDER DENYING APPELLANTS' PETITION FOR REHEARING

Second Day, March Term, Tuesday, March 5th, 1957.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Walter A. Huxman and Honorable John C. Pickett, Circuit Judge.

This cause came on to be heard on the petition of appellants for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

APPENDIX D

STATUTES INVOLVED

I. *Miller Act, Sections* 1 *and* 2:

Section 1. (49 Stat. 793; 40 U.S.C., §270a)

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

Section 2. (49 Stat. 794; 40 U.S.C., §270b)

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished

under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and

executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

II. *Armed Services Procurement Act of* 1947, *Sections* 2(*c*), 3 *and* 4.

Section 2(c). (62 Stat. 21; 41 U.S.C., §151(c))

All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if —

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

(2) the public exigency will not admit of the delay incident to advertising;

(3) the aggregate amount involved does not exceed $1,000;

(4) for personal or professional services;

(5) for any service to be rendered by any university, college, or other educational institution.

(6) the supplies or services are to be procured and used outside the limits of the United States and its possessions;

(7) for medicines or medical supplies;

(8) for supplies purchased for authorized resale;

(9) for perishable subsistence supplies;

(10) for supplies or services for which it is impracticable to secure competition;

(11) the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of supplies for experimentation, development, research, or test: Provided, That beginning six months after the effective date of this chapter and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this subsection since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder;

(12) for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;

(13) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest;

(14) for supplies of a technical or specialized nature requiring a substantial initial investment or an extended

period of preparation for manufacture, as determined by the agency head, when he determines that advertising and competitive bidding may require duplication of investment or preparation already made, or will unduly delay procurement of such supplies;

(15) for supplies or services as to which the agency head determines that the bid prices after advertising therefor are not reasonable or have not been independently arrived at in open competition: Provided, That no negotiated purchase or contract may be entered into under this paragraph after the rejection of all bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder, (B) the negotiated price is lower than the lowest rejected bid price of a responsible bidder, as determined by the agency head, and (C) such negotiated price is the lowest negotiated price offered by and responsible supplier;

(16) the agency head determines that it is in the interest of the national defense that any plant, mine, or facility or any producer, manufacturer, or other supplier be made or kept available for furnishing supplies or services in the event of a national emergency, or that the interest either of industrial mobilization in case of such an emergency, or of the national defense in maintaining active engineering, research and development, are otherwise subserved: Provided, That beginning six months after the effective date of this chapter and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to

this subsection since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder; or

(17) otherwise authorized by law.

Section 3. (62 Stat. 22; 41 U.S.C., §152)

Whenever advertising is required—

(a) The advertisement for bids shall be a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned.

(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: Provided, That all bids may be rejected when the agency head determines that it is in the public interest so to do.

Section 4. (62 Stat. 23, as amended by 65 Stat. 700; 41 U.S.C., §153)

Except as provided as subsection (b) of this section, contracts negotiated pursuant to section 151 (c) of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 151 (c) of this title shall contain a suitable warranty, as determined

by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of such warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

(b) The cost-plus-a-percentage-of-cost system of contracting shall not be used, and in the case of a cost-plus-a-fixed-fee contract the fee shall not exceed 10 per centum of the estimated cost of the contract, exclusive of the fee, as determined by the agency head at the time of entering into such contract (except that a fee not in excess of 15 per centum of such estimated cost is authorized in any such contract for experimental, developmental, or research work and that a fee inclusive of the contractor's costs and not in excess of 6 per centum of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project). Neither a cost nor a cost-plus-a-fixed-fee contract nor an incentive-type contract shall be used unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure supplies or services of the

kind or quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive-type contract. All cost and cost-plus-a-fixed-fee contracts shall provide for advance notification by the contractor to the procuring agency of any subcontract thereunder on a cost-plus-a-fixed fee basis and of any fixed-price subcontract or purchase order which exceeds in dollar amount either $25,000 or 5 per centum of the total estimated cost of the prime contract; and a procuring agency, through any authorized representative thereof, shall have the right to inspect the plants and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.

(c) All contracts negotiated without advertising pursuant to authority contained in this chapter shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts.

AUTHORITY CITED

CASE	PAGE
Foulger v. McGrath, 34 Utah 86, 95 Pac. 1004	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 899.

WUNDERLICH CONTRACTING COMPANY, a corporation; CURLETT CONSTRUCTION COMPANY, a corporation; and CHAS. H. TOMPKINS CO., a corporation, doing business as a joint venture under the name of WUNDERLICH, CURLETT & TOMPKINS; NATIONAL SURETY CORPORATION, a corporation; CONTINENTAL CASUALTY COMPANY, a corporation; THE TRAVELERS INDEMNITY COMPANY, a corporation,

Petitioners,

vs.

UNITED STATES OF AMERICA *ex rel.* REISCHEL & COTTRELL, a California corporation; and MARTIN BROS., a co-partnership consisting of W. L. MARTIN and JOHN MARTIN, doing business as a joint venture under the name of REISCHEL & COTTRELL-MARTIN BROS.,

Respondents.

OPPOSING BRIEF OF RESPONDENTS.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondents herein, Reischel & Cottrell and Martin Bros., respectfully pray that the petition for writ of certiorari by the petitioners herein be denied.

It appears to respondents that the petitioners in their petition, as they did in their petition for rehearing before the Circuit Court of Appeals, are making every effort to obtain an opinion which will indicate that the contract between themselves and the Government was abandoned.

Neither in the decision of the District Court nor in the opinion of the Circuit Court of Appeals is there the slightest intimation that the prime contract between the Government and the petitioners herein was abandoned. This question was not before the court and was not necessary to the decision. Yet petitioners make the statements no less than fifteen times that the *prime* contract was abandoned and that the plans and specifications were furnished subcontractor by the Government.

The basis of the decision of the District Court and of the opinion by the Circuit Court of Appeals is not that which petitioners set forth. Neither the record nor the opinion of the Circuit Court of Appeals supports the conclusion of petitioners that the plans and specifications were presented to respondent subcontractors by the Government. The plans and specifications, which were presented to the respondents, were those furnished to the subcontractors by the petitioners, and the changes which were made, resulting in an abandonment of the *subcontract,* were, insofar as the subcontractors are concerned, changes of the petitioners, the prime contractor.

Further, the "questions presented" by petitioners would appear to be the facts of an entirely different case from that which went to trial. A truer picture of the facts of this case would be contained in a question such as this: Is a subcontractor entitled to recover under an implied contract from the prime contractor who required him to furnish materials and services, entirely different in time and labor and amount of materials from those contemplated by the parties at the time the subcontractor bid on the job and signed the subcontract, and where the changes from the plans and specifications bid upon are so extensive as to constitute completely new and different plans and

specifications and such changes take place piecemeal, so that the cumulative effect of all the changes was not cognizable until completion of the construction?

The Miller Act bond is for the protection of materialmen and laborers and not for the benefit of the prime contractor, and there is no necessity that a written *subcontract* be entered into in order for a laborer or materialman to sue on the bond. In the instant case the bond was written for the purpose of protecting laborers and materialmen who furnished services and materials in the construction of a 500-bed Veterans Administration hospital in Salt Lake City. The respondent subcontractors herein performed their services and furnished their materials for a 500-bed Veterans Administration hospital in Salt Lake City.

Petitioners also would have this Honorable Court believe that the court below and the Circuit Court of Appeals based their determination of "reasonable value" solely upon the total costs of the subcontractors, plus overhead and profit. This was but a portion of the evidence taken into consideration bearing on the question of "reasonable value." The testimony of petitioners' own witnesses that the charges were reasonable and the fact that the petitioners filed claims with the Government for identical sums, and added thereto a profit and overhead expense of their own, were some of the other factors taken into consideration in arriving at "reasonable value."

Petitioners cite as authority for eliminating profits from the reasonable value of services the case of *Foulger v. McGrath,* 34 Utah 86, 95 Pac. 1004, but that case does not support petitioners' conclusion. In the cited case the contractor sought to recover on *quantum meruit* in addition to the profit he would have received under the contract,

and there is nothing in the cited case to indicate that evidence of overhead and profit is inadmissible on the question of "reasonable value."

In conclusion, may we say that the questions involved in this case are purely academic and episodic and do not involve important questions of Federal law which have not been settled by the Supreme Court. The decision is primarily a factual one, but it will, respondents hope, prevent prime contractors from operating under the illusion that they are merely brokers between materialmen and subcontractors and the owner, and not responsible to their subs for their own carelessness, negligence and the representations made to a subcontractor when the prime is requesting a bid.

Respectfully submitted,

JOHN S. BOYDEN,

LEWIS C. TEEGARDEN,

Counsel for Respondents.